IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHARON BURNETTE, PAMELA K. BURROUGHS, FRANK CARTER, JR., EDWARD CONQUEST, DONALD W. HOFFMAN, MONTY KING, LARRY MACON, MARVIN MCCLAIN, BENJAMIN PERDUE, JR., HENRY STUMP And BARBARA TABOR, suing on behalf of themselves and others similarly situated,

Plaintiffs,

v. Civil Action No. 3:10cv70

HELEN F. FAHEY, in her capacity as Chair of the Virginia Parole Board; CAROL ANN SIEVERS, in her capacity as Vice-Chair of the Virginia Parole Board; and JACKIE T. STUMP, MICHAEL M. HAWES, and RUDOLPH C. MCCOLLUM, JR., in their capacity as Members of the Virginia Parole Board,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e)

Defendants, by counsel, oppose Plaintiffs' Motion To Alter or Amend Judgment, and state as follows.

On May 11, 2010, this Court heard oral argument on the Motion to Dismiss that was thoroughly briefed by both parties. On October 25, 2010, this Court granted Defendant's Rule 12(b)(6) motion to dismiss with an accompanying memorandum opinion.[1] Plaintiffs, by counsel, have filed a timely motion to alter or amend the judgment of this Court. Plaintiffs request that this Court vacate the order to provide that the dismissal be without prejudice and to

[1] On October 27, 2010, orders clarifying typographical errors were entered.

provide Plaintiffs a period of at least 60 days from the date of the order to file a motion for leave to file an amended complaint. Plaintiffs have not proffered their intended amended complaint. Plaintiffs' request fails to meet the standard for vacating or altering a judgment under Rule 59(e).

Plaintiffs have moved for the judgment to be vacated under Rule 59(e) but have failed to show any of the three requisite grounds. For Rule 59(e) relief, plaintiffs must be able to show that the amendment of judgment is necessary to either (1) accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *Lux v. Spotswood Constr. Loans*, 176 Bankr. 416 (E.D. Va. 1993), *aff'd.*, 43 F.3d 1467 (4th Cir. 1994); *Equal Opportunity Employment Opportunity Commission, v. Lockheed Martin Corp.*, 116 F.3d 110 (4th Cir. 1997). Plaintiffs have neither asserted nor supported such showings.

Plaintiffs have not cited, nor are Defendants aware of, any change in the controlling law. Plaintiffs have not cited any new evidence to support such a motion. The motion simply states that "counsel will allege additional facts to support the central allegation that the Defendants are not providing even the minimal consideration for parole that is mandated by due process." Memorandum In Support of Plaintiffs' Motion to Alter or Amend Judgment Pursuant to Rule 59(E) at 5. However, this neither provides the facts nor explains why such facts were not previously alleged and could not be previously discovered. This self serving statement is not a sufficient showing of new evidence not available for trial. *See Hutchinson v. Staton*, 994 F.2d 1076 (4th Cir. 1993). Plaintiffs do not allege any error of law in this Court's Memorandum Opinion or the accompanying motion rulings. Likewise, nothing in Plaintiffs' motion asserts or supports any manifest injustice to be corrected by a leave to amend.

Plaintiffs do not append their proposed amended pleading to the motion so neither counsel nor this Court can evaluate it to determine what injustice would be corrected. The only indications provided in the motion before this Court is counsel's representations about what they would ask their clients to agree to, including asking certain Plaintiffs to voluntarily remove themselves from the proposed class. Given that Counsels for Plaintiffs cannot direct their clients to do so, it is impossible to determine whether this contingency would materialize.

Based on what counsel for Plaintiffs state they would hope to file, the amended claim still would not address any manifest injustice to qualify for relief under Rule 59(e). Counsel represent that they wish to remove the Plaintiffs who are violent offenders whose decisions manifest that the Board considered factors other than the originating crime. While this would remove some of the internal inconsistencies of the pleading, it would not change the factual findings that this Court has already made regarding the Board and the currently named Plaintiffs. This Court found on the basis of Plaintiffs' own pleading: "…Plaintiffs' own submissions reflect that the Board continues to consider the other factors listed in statute in evaluating them and other violent inmates for parole." Memorandum Opinion (Mem. Op.) at 21-22. In its discussion of what factors the Board considers, the Court noted that some of the Plaintiffs (such as Burroughs) had received parole denials citing factors in addition to her murder conviction. *See* Mem. Op. at 22, f. 8. These instances where the Board affirmatively cites factors other than the nature of the offense is evidence that directly counters one of Plaintiffs' contentions—that the Board is denying parole solely on the nature of the crime without looking at other factors. Simply eliminating those particular plaintiffs after the fact does not change the factual finding that the Board does consider other factors and that the Board has not effectively abolished parole. Just as importantly, this Court did not base this particular factual finding solely on the presence

of those particular Plaintiffs but cited to other portions of Plaintiffs' pleading including Plaintiffs own statistics. *See* Mem. Op. at 22-24. Plaintiffs do not appear to dispute the findings of this Court or the evidence that the Court relied upon. Instead, Plaintiffs appear to seek to remove the basis for the findings from the pleading, thereby undercutting them. Just as omitting certain Plaintiffs would not change the veracity and legitimacy of the factual finding, omitting the statistics would not change them or the practices that they represent. The removal of certain Plaintiffs from an amended pleading would not serve to correct a manifest injustice simply because they, in part, help disprove the assertion that the Plaintiffs wish the Court to accept.

Plaintiffs have had ample time and opportunity to amend the complaint prior to judgment. After extensive briefing by the parties, the hearing on the Motion To Dismiss was conducted on May 11, 2010. Plaintiffs did not move for leave to amend prior to this Court's ruling on October 25, 2010, in spite of the arguments, the briefs, and the Court's own questioning during oral argument. If there were a manifest injustice capable of being avoided by an amended complaint, Plaintiffs had ample opportunity prior to this Court's ruling in which to do so. Instead, after a final judgment has been entered, Plaintiffs still do not proffer an amended complaint but merely request this Court vacate its order to permit them the opportunity to attempt to do so.

Accordingly, Plaintiffs not having made the requisite showing for relief under *Fed. R. Civ. P.* 59(e), the motion to alter or amend should be denied.

Respectfully submitted,

HELEN F. FAHEY
CAROL ANN SIEVERS
JACKIE T. STUMP
MICHAEL M. HAWES
RUDOLPH C. MCCOLLUM, JR.

By: _____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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And I hereby certify that I will mail the document by U.S. mail to the following non-filing user:

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